

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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RONALD LOADHOLT,

Plaintiff,

- v -

Civ. No. 9:09-CV-0658  
(LEK/RFT)

WILLIAM LAPE, *Superintendent of Coxsackie Corr. Facility*;  
DR. MILLER, *Facility Health Services Director*;  
K. CAVANAUGH, *Psychological Services Unit Chief*;  
MCDERMOTT, *Lieutenant*;  
DR. SCHLENGER, *Dental Health Services*;  
J. SMITH, *Deputy Superintendent of Health Services*,

Defendants.

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**APPEARANCES:**

**OF COUNSEL:**

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Plaintiff, *Pro Se*  
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**RANDOLPH F. TREECE**  
**United States Magistrate Judge**

**REPORT-RECOMMENDATION and ORDER**

*Pro se* Plaintiff Ronald Loadholt filed this civil rights action, pursuant to 42 U.S.C. § 1983, alleging that the Defendants violated his constitutional rights under the Eighth and Fourteenth Amendments. Dkt. No. 9, Second Am. Compl. Defendants bring a Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), Dkt. No. 28, which Plaintiff opposes, Dkt. No. 36. For the reasons that follow, we recommend that Defendants' Motion be

**granted** and Plaintiff's Second Amended Complaint be **dismissed** in its entirety.

### **I. BACKGROUND**

Plaintiff initiated this action on June 8, 2009, while an inmate at Cossackie Correctional Facility, with the filing of a civil rights Complaint. *See* Dkt. No. 1. The Honorable Lawrence E. Kahn, Senior United States District Judge, found that both Plaintiff's Complaint and his subsequent Amended Complaint (Dkt. No. 7) could not proceed as drafted, but permitted Plaintiff, in light of his *pro se* status, the opportunity to amend his pleadings to cure various deficiencies therein. *See* Dkt. Nos. 6, Order, dated Aug. 12, 2009 & 8, Order, dated Sept. 29, 2009. In accordance with those Orders, Plaintiff filed his Second Amended Complaint with this Court on October 10, 2009. Dkt. No. 9.

On a motion to dismiss, the allegations of the complaint must be accepted as true. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972). In light of the terse, sparse, and vague claims in Plaintiff's Second Amended Complaint, we now restate the allegations in full and verbatim:

defendant McDermott refuse to give Plaintiff hearing assistance Plaintiff is Learning disable and refuse OMH testment of Plaintiff mental illness Dates 10/20/08, 12/5/08, 10/23/08 causing Plaintiff to lose freedom

defendant K cavanaugh no Psychological crisis treatment or suicide prevention when Plaintiff stop eat And drink lost alot of weight pacing not sleeping, or showering Date 12-23-08 to 1-5-09 causing Plaintiff Mental condition to get even more bad coming close to dead phyical pain,

defendant: Dr: Schlenger no dental services for tooth pain from 10-3-09 to 2-3-09<sup>1</sup> wait at coxsaxie receive no dental services causing Plaintiff more pain and lost of tooth

defendant: J SMITH refuse to remove Plaintiff from RMV and place (Plaintiff) in

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<sup>1</sup> Without additional supporting facts or clarification, this Court is unsure whether Plaintiff means to claim the pertinent dates were from February 3, 2009 until October 3, 2009, and simply stated in reverse, or rather from October 3, 2008 until February 3, 2009, and simply inserted a typographical error. Regardless, ambiguity on the stated dates does not change this Court's analysis.

hospital after lose alot of weight to be force feeded Date 12-21-09 to 1-05-09<sup>2</sup>  
 causing mental and physical pain  
 defendant: William Lape  
 not given Plaintiff hearing, or grievance or legal assistance from 10-20-08 to 2-3-09  
 causing mental and physical pain  
 defendant Dr Miller allow mental ill patients to lose alot of weight 12-23-08 to 1-5-  
 09 place plaintiff on 3 floor and not on flat 10-5-09 – 2-2-09<sup>3</sup> not give better pain  
 medical, cane, mattress, pillow, no medical accomodational better shoe's etc.  
 Second Am. Compl. at pp. 5-7.

## II. DISCUSSION

### A. Standard of Review

On a motion to dismiss, the allegations of the complaint must be accepted as true. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972). The trial court's function "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (*overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984)).

"Generally, in determining a 12(b)(6) motion, the court may only consider those matters alleged in the complaint, documents attached to the complaint, and matters to which the court may take judicial notice." *Spence v. Senkowski*, 1997 WL 394667, at \*2 (N.D.N.Y. July 3, 1997) (citing *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991)). Moreover, "even if not attached or incorporated by reference, a document 'upon which [the complaint] *solely* relies and which is *integral to the complaint*' may be considered by the court in ruling on such a motion." *Roth v.*

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<sup>2</sup> *See supra* note 1.

<sup>3</sup> *See supra* note 1.

*Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (emphasis in original) (quoting *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991)).

The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the “well-pleaded” allegations of the complaint. *See Retail Clerks Intern. Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 373 U.S. 746, 754 n. 6 (1963); *see also Arar v. Ashcroft*, 532 F.3d 157, 168 (2d Cir. 2008). Nevertheless, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009). Therefore, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citation omitted).

A motion to dismiss pursuant to Rule 12(b)(6) may not be granted so long as the plaintiff’s complaint includes “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. at 1960 (citing *Twombly*).<sup>4</sup> “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. at 1949. This plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* Thus, in spite of the deference the court is bound to give to the plaintiff’s allegations, it is not proper for the court to assume that “the [plaintiff] can prove facts [which he or she] has not alleged, or that the defendants have violated the . . . laws in ways that have not been

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<sup>4</sup> By its opinion in *Bell Atl. Corp. v. Twombly* and then again in *Ashcroft v. Iqbal*, the Supreme Court abrogated the often-cited language of *Conley v. Gibson* “that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 561 (2007) (quoting *Conley*, 355 U.S. 41, 45-46 (1957)). In so doing, the Court found that *Conley* “described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival.” *Id.* at 563.

alleged.” *Assoc. Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983). The process of determining whether a plaintiff has “nudged [his] claims . . . across the line from conceivable to plausible,” entails a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S.Ct. at 1950-51.

With this standard in tow, we consider the plausibility of Plaintiff’s Second Amended Complaint.

### **B. Eighth Amendment**

Plaintiff claims, albeit in a quite cursory manner, that the Defendants violated his constitutional rights under the Eighth Amendment by their deliberate indifference to his medical needs and by subjecting him to harsh and atypical prison conditions.

To state a claim under § 1983 for deprivation of medical treatment in violation of the Eighth Amendment, a plaintiff must show that the defendant acted with “deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Thus, “[t]he deliberate indifference standard embodies both an objective and a subjective prong” which the plaintiff must establish. *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir.1994), *cert. denied*, 513 U.S. 1154 (1995). Under the objective prong, the alleged medical need must be “sufficiently serious.” *Id.*; *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998). Under the subjective component, the plaintiff must demonstrate that the defendants acted with “a sufficiently culpable state of mind.” *Hathaway v. Coughlin*, 37 F.3d at 66. This standard must be met for each claim against each individual Defendant in this action.

*1. Defendant Cavanaugh*

Plaintiff alleges that Defendant Cavanaugh did not provide “psychological crisis treatment or suicide prevention” after Plaintiff stopped eating, drinking, sleeping, or showering. Second Am. Compl. at p. 5. In accordance with the deliberate indifference standard, we will delve into Plaintiff’s allegation to determine if this statement – Plaintiff’s only mention of Defendant Cavanaugh – is enough to implicate both an objective substantial risk of serious harm and a sufficiently culpable state of mind.

“A serious medical condition must be ‘a condition of urgency, one that may produce death, degeneration, or extreme pain.’” *Osacio v. Greene*, 2009 WL 3698382, at \*4 (N.D.N.Y. Nov. 2, 2009) (quoting *Hathaway v. Coughlin*, 37 F.3d at 66). “Factors that have been considered in determining whether a condition is serious include ‘[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s daily activities; or the existence of chronic and substantial pain.’” *Id.* (quoting *Chance v. Armstrong*, 143 F.3d at 702) (other citations omitted). The “factors listed above, while not the only ones that might be considered, are without a doubt highly relevant to the inquiry into whether a given medical condition is a serious one.” *Chance v. Armstrong*, 143 F.3d at 703.

Here, the question is whether the deprivation of psychological treatment or suicide prevention procedures triggers an objectively serious risk of harm within the context of the Eighth Amendment. Taking the Plaintiff’s claims as true, it appears he had a need for mental health services that went unmet. This Court, in accord with multiple decisions in this Circuit, recognizes that allegations of mental illness, especially when accompanied with suicidal ideation, state a

plausible claim that Plaintiff's mental health needs were sufficiently serious. *See, e.g., Allah v. Kemp*, 2010 WL 1036802, at \*6, n.9 (N.D.N.Y. Feb. 25, 2010) (finding the failure to provide plaintiff with a mental health evaluation, notwithstanding his attempted suicide three days earlier, was enough to meet the "sufficiently serious" standard); *Hamilton v. Smith*, 2009 WL 3199531, at \*14 (N.D.N.Y. Jan. 13, 2009) (finding plaintiff's claimed history of suicidal thoughts sufficient to raise a question of fact as to serious medical need); *Covington v. Westchester Cnty. Dept. of Corrs.*, 2010 WL 572125, at \*6 (S.D.N.Y. Jan. 25, 2010) (citing cases where courts have found that depression with suicidal ideation, or severe anxiety attacks, are sufficiently severe conditions to meet the objective prong of deliberate indifference); *see also Zimmerman v. Burge*, 2009 WL 3111429, at \*8 (N.D.N.Y. Sept. 24, 2009) (reviewing published case law discussing whether depression either with or without suicidal ideation is a "sufficiently serious" medical condition). Therefore, Plaintiff's statement pertaining to Defendant Cavanaugh, though brief, is enough to satisfy the objective prong of the deliberate indifference standard.

Regarding the subjective component, however, Plaintiff does not allege that Defendant Cavanaugh denied him medical services with any ill state of mind, or even that Cavanaugh was aware of the substantial medical risk. An official acts with the requisite deliberate indifference when that official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

Upon reading Plaintiff's Second Amended Complaint liberally, as well as his Opposition to Defendants' Motion to Dismiss, Dkt. No. 36, we conclude that Plaintiff makes no allegation as to Cavanaugh's awareness of Plaintiff's serious health risk. Thus, while mental illness and

corresponding suicidal tendencies left untreated can be sufficiently serious to reach an Eighth Amendment claim, there are no facts in Plaintiff's pleading to allow this court to infer, let alone find, that Defendant Cavanaugh possessed the culpable state of mind required to allege deliberate indifference to a medical need. Accordingly, we recommend Plaintiff's claim against Defendant Cavanaugh be **dismissed**.

*2. Defendant Miller*

Plaintiff additionally alleges Eighth Amendment violations against Defendant Miller, who, according to the best interpretation this Court can muster, violated Plaintiff's constitutional rights by allowing him to lose weight and by failing to give Plaintiff "better pain medica[tion], cane, mattress, pillow . . . better shoes," and by placing Plaintiff on "3 floor and not on flat." Second Am. Compl. at p. 7.

This claim against Defendant Miller also fails to allege facts sufficient to survive Defendants' 12(b)(6) Motion to Dismiss. As with Defendant Cavanaugh, Plaintiff does not make any mention that Defendant Miller was aware of any serious risk to the Plaintiff, let alone that he acted with the requisite wantonness. Therefore, Plaintiff cannot claim Miller was deliberately indifferent to his medical needs.

Furthermore, to the extent that Plaintiff is claiming that the conditions of his confinement constituted cruel and unusual punishment in violation of the Eighth Amendment, this claim also falls short. In the context of an Eighth Amendment claim based on prison conditions, the prisoner must demonstrate that the deprivation is objectively sufficiently serious such that the plaintiff was "den[ied] the minimal civilized measure of life's necessities," and that the prison officials subjectively "knew of and disregarded an excessive risk to inmate health or safety." *Branham v.*



*Meachum*, 77 F.3d 626, 630-31 (2d Cir. 1996) (internal citations omitted).

Turning to the objective analysis, Plaintiff's allegations do not trigger the conclusion that Plaintiff was denied the minimal civilized measure of life's necessities, as the Constitution "does not mandate comfortable prisons," *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981), but instead only requires that inmates not be deprived of their "basic human needs - e.g., food, clothing, shelter, medical care, and reasonable safety," *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (citation omitted). In accord, courts in this Circuit have found the deprivations of better pain medicine, a cane, a mattress, a pillow, or "better shoes," as the Plaintiff has alleged, do not meet, neither singularly nor collectively, the objective standard under the Eighth Amendment.<sup>5</sup> However, it is more complete to say that Plaintiff's failure to allege any facts indicating that Defendant Miller acted, or did not act, with a wanton state of mind, forecloses any colorable allegation that he was denied his constitutional rights under the Eighth Amendment regarding prison conditions. *See Vaughan v. Erno*, 8 F. App'x 145, 146-47 (2d Cir. 2001) (finding complained conditions of confinement did not constitute an Eighth Amendment violation because plaintiff failed to show defendants acted with deliberate indifference, even assuming that he sufficiently alleged a serious

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<sup>5</sup> *See Brown v. Eagen*, 2009 WL 815724, at \*9 (N.D.N.Y. Mar. 26, 2009) (stating that the prison officials have the broad discretion to determine the nature and character of the medical treatment afforded to inmates, as "[a]n inmate does not have the right to treatment of his choice") (citing, *inter alia*, *Dean v. Coughlin*, 804 F.2d 207, 215 (2d Cir. 1986)); *Williams v. Perlman*, 2009 WL 1652193, at \*6-7 (N.D.N.Y. Feb. 5, 2009) (finding a prisoner who specifically complained that his orthopedic shoes created "intense pain on [his] toes and arches" and caused him to develop painful callouses which needed to be "lanced from [his] feet" did not adequately suggest in his complaint that his foot, ankle, or arch condition presented an issue of degeneration or extreme pain); *Borges v. McGinnis*, 2007 WL 1232227, at \*4-6 (W.D.N.Y. Apr. 26, 2007) (find that an inmate given only a paper gown, slippers, a thin mattress, and no blanket, while confined for three days in a room with an open window that reduced the temperature to approximately 50 degrees, failed to meet the objective element of an Eighth Amendment violation); *Bell v. Artuz*, 1999 WL 253607, at \*3-4 (S.D.N.Y. Apr. 29, 1999) (noting that no Eighth Amendment claim is implicated where prisoner alleges no pillows, a lack of space in double-occupancy cell, poor ventilation, asbestos on catwalk behind cells, no bacterial soap, and insufficient lighting); *Veloz v. New York*, 35 F. Supp. 2d 305, 309 & 312 (S.D.N.Y. 1999) (stating prisoner's foot condition, which involved increasing pain and required surgery, was not sufficiently serious); *Alston v. Howard*, 925 F. Supp. 1034, 1040 (S.D.N.Y. 1996) (finding prisoner's ankle condition and resulting foot pain requiring the use of special footwear was not sufficiently serious).

harm); *Carr v. Canty*, 2011 WL 309667, at \*2 (S.D.N.Y. Jan. 19, 2011) (finding a plaintiff did not satisfy the deliberate indifference requirement of an Eighth Amendment claim regarding conditions of confinement because defendants responded to complaints of a wet and slippery floor “albeit, not in the manner in which [plaintiff] preferred” and took action to cover the water); *Hughes v. Butt*, 2009 WL 3122952, at \*10 (N.D.N.Y. Sept. 28, 2009) (concluding that a defendant, who the plaintiff did not allege to have any visual indication or awareness that plaintiff needed a cane, back brace, or knee brace, did not act deliberately indifferent towards plaintiff); *Savage v. Brue*, 2007 WL 3047110, at \*9 (N.D.N.Y. Oct. 18, 2007) (finding a nurse, who refused pain medication to an inmate confined in a special housing unit for forty-eight (48) hours with no mattress and back and neck pain due to a recent injury and who advised the inmate that he would need to “adjust to it,” to be possibly negligent in her care, but not deliberately indifferent). Therefore, we recommend Plaintiff’s claim against Defendant Miller be **dismissed**.

### *3. Defendant Schlenger*

Plaintiff also claims that Defendant Schlenger, presumably in his position as a doctor of dental health at Coxsackie, did not give Plaintiff “dental services for tooth pain from 10-3-09 to 2-3-09 . . . causing Plaintiff more pain and los[s] of tooth.” Second Am. Compl. at p. 6.

“Dental conditions, like other medical conditions, may be of varying severity.” *Chance v. Armstrong*, 143 F.3d at 702. Thus, the constitutionality of a decision to leave a dental condition untreated will depend on the facts of the particular case. *Harrison v. Barkley*, 219 F.3d 132, 137-38 (2d Cir. 2000). The Second Circuit has held, in the context of failing to treat a dental injury, that a “serious medical condition exists where ‘the failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain.’” *Id.* at 136 (finding that

while a tooth cavity is not strictly a serious medical condition, it is a degenerative condition which “is likely to produce agony and to require more invasive and painful treatments” if left untreated) (quoting *Chance v. Armstrong*, 143 F.3d at 702).

However, Plaintiff does not allege any facts regarding any particular type of oral injury or condition that would aid this Court in its 12(b)(6) inquiry, but rather only “tooth pain,” which eventually led to the loss of the tooth. Plaintiff also alleges no facts to suggest that Defendant Schlenger or anyone else should have been aware of his tooth pain.<sup>6</sup> This claim against Defendant Schlenger is utterly bereft of factual allegations which would allow for the Court to deduce the plausibility of a cognizable cause of action, *Ashcroft v. Iqbal*, \_\_ U.S. \_\_, 129 S.Ct.1937, 1949 & 1960 (2009), or which would permit a defendant “to have a fair understanding of what the plaintiff is complaining about and to know whether there is a legal basis for recovery,” *Ricciuti v. New York City Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991). Thus, because this claim is without factual allegations setting forth that Defendant Schlenger violated Plaintiff’s constitutional rights, we recommend that this claim be **dismissed**.

#### 4. Defendant Smith

Lastly, Plaintiff alleges that Defendant Smith, Deputy of Health Services, violated his rights under the Eighth Amendment by refusing to place him in a hospital after Plaintiff lost a lot of weight, resulting in “mental and physical pain.” Second Am. Compl. at pp. 3 & 6.

In this case, unlike with Plaintiff’s allegations against any of the previously considered Defendants, Plaintiff claims that “Smith refuse[d]” to act, which led to the alleged constitutional violation. As this Court is charged with the mandate of construing Plaintiff’s claims leniently, we

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<sup>6</sup> Curiously, in opposing Defendants’ request for dismissal, Plaintiff fails to mention Defendant Schlenger or allegations of facts supporting his claim of tooth pain, though he references his various other claims. *See* Dkt. No. 36.

are willing to impute from the use of the word “refuse” enough to satisfy the wanton state of mind requirement of deliberate indifference. In order to “refuse” or decline to do something, one must necessarily be aware of the request or the issue, and subsequently choose not to act, implicating that Defendant Smith acted, or did not act, with a culpable mind set of more than mere negligence. Thus, Plaintiff has alleged enough, in this case, to satisfy the subjective prong of Eighth Amendment deliberate indifference.

Regardless, Plaintiff’s claim must fail, as he does not allege a sufficiently serious injury or risk of injury. He claims that Defendant Smith failed to place Plaintiff in a hospital due to Plaintiff’s loss of weight. Plaintiff does not allege how much weight he lost, if that weight loss was dangerous to his health, or why he lost the weight.<sup>7</sup> Notably, Plaintiff also does not state why hospitalization was warranted or necessary to remedy this weight loss, as opposed to another form of treatment. *See O’Connor v. McArdle*, 2006 WL 436091, at \*5 (“It is well-established that mere disagreement over the proper treatment does not create a constitutional claim. So long as the treatment given is adequate, that fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment violation.”). Therefore, there are no allegations in the pleading to “conclude that [P]laintiff’s . . . weight loss concerns represented a condition of urgency or resulted in degeneration or extreme pain sufficient to implicate an Eighth Amendment violation.” *Evans v. Albany Cnty. Corr. Facility*, 2009 WL 1401645, at \*10 (N.D.N.Y. May 14, 2009) (quoting *Bost v. Bockelmann*, 2007 WL 527320, at \*8 (N.D.N.Y. Feb. 20, 2007)). Thus, while Plaintiff has alleged enough to satisfy the subjective prong of the Eighth Amendment deliberate indifference standard, his failure to allege a sufficiently serious medical condition means this claim should be **dismissed**.

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<sup>7</sup> The Court notes that Plaintiff mentions he “stop[ped] eat[ing] and drink[ing] lost alot [sic] of weight” in relation to a claim separate from his claim against Defendant Smith. Second Am. Compl. at p. 5.

### C. Due Process

While not explicitly stated in Plaintiff's pleadings, this Court concludes that, by liberally construing Plaintiff's Second Amended Complaint, some of his allegations concern a violation of his rights under the Due Process clause of the Fourteenth Amendment. Specifically, Plaintiff complains that Defendants Lape and McDermott acted in such a way that they violated his right to procedural due process. We will examine the claims against each Defendant *seriatim*.

#### 1. Defendant Lape

Plaintiff claims, in cursory fashion, that Defendant Lape, who Plaintiff describes as the "superintendent" of Coxsackie, did "not give[] Plaintiff hearing, or grievance or legal assistance from 10-20-08 to 2-3-09 causing mental and physical pain." Second. Am. Compl. at pp. 1 & 6.

It is well-settled that the personal involvement of a defendant is a prerequisite for the assessment of damages in a § 1983 action. *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977). Furthermore, the doctrine of *respondeat superior* is inapplicable to § 1983 claims. *See Polk County v. Dodson*, 454 U.S. 312, 325 (1981) (internal citations omitted); *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). Thus, a defendant may not be liable for damages simply by virtue of holding a supervisory position, without more. *See, e.g., Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996). Rather, the personal involvement of a supervisory defendant may be shown by evidence that:

(1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

*Colon v. Coughlin*, 58 F.3d at 873.

Plaintiff does not explain what Defendant Lape purportedly did to deny Plaintiff of assistance in any hearing or grievance process, nor suggest facts that Lape himself was involved in any way in any constitutional violation. Rather, Plaintiff appears to be bringing legal action against Lape due to his supervisory position only. Because the “proper focus is the [D]efendant’s direct participation in, and connection to, the constitutional deprivation,” *McClary v. Coughlin*, 87 F. Supp. 2d 205, 215 (W.D.N.Y. 2000), and because one cannot be liable solely from holding a supervisory position, we find Plaintiff’s claim against Defendant Lape should be **dismissed** for lack of personal involvement.

## 2. Defendant McDermott

Liberal construed, Plaintiff claims that Defendant McDermott refused to give Plaintiff “hearing assistance” or allow the Office of Mental Health to testify that Plaintiff is “learning disable[d]” and has a mental illness, which caused the Plaintiff to “lose freedom.” Second Am. Compl. at p. 5.

In order to state a procedural due process claim pursuant to the Fourteenth Amendment, an inmate must show that he possessed an actual liberty or property interest, and that he was deprived of that interest without sufficient process. *See Shakur v. Selsky*, 391 F.3d 106, 118 (2d Cir. 2004). Inmates’ liberty interests are typically derived from two sources: the Due Process Clause of the Fourteenth Amendment, and state statute or regulations. *Arce v. Walker*, 139 F.3d 329, 333 (2d Cir. 1998) (citing *Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). With regard to liberty interests arising directly under the Due Process Clause, the Supreme Court has “narrowly circumscribed its scope to protect no more than the ‘most basic liberty interests in prisoners.’” *Id.* (quoting *Hewitt v. Helms*, 459 U.S. 460, 467 (1983)). With regard to State created liberty interests, the Supreme Court held in *Sandin v. Conner* that state created liberty interests shall be limited to

those deprivations which subject a prisoner to “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.” 515 U.S. 472, 484 (1995).

Here, Plaintiff has not alleged enough facts to indicate a viable Due Process violation under the Constitution. He argues, in effect, that he did not receive a meaningful hearing because Defendant McDermott denied Plaintiff assistance in some unidentified hearing. The only liberty interest that Plaintiff alleged to have lost was the loss of freedom. *See* Second Am. Compl. at p. 5. Without specifics about the nature and conditions of the alleged loss of freedom, Plaintiff does not state an “atypical and significant hardship . . . to which the conditions of the disciplinary segregation differ from other routine prison conditions and the duration of the disciplinary segregation compared to discretionary confinement.” *Shuler v. Brown*, 2009 WL 790973, at \*7 (N.D.N.Y. Mar. 23, 2009) (quoting *Palmer v. Richards*, 364 F.3d 60, 64 (2d Cir. 2004)). The loss of freedom, inherent in the “ordinary incidents of prison life,” *Sandin v. Conner*, 515 U.S. at 483-86, does not constitute, without alleging more, an atypical and significant hardship on an inmate. Nor has he shown a deprivation of liberty under the Due Process Clause. Furthermore, this statement is devoid of any factual allegation that this Court could examine to determine if the procedure provided by the State to Plaintiff was in fact insufficient, or what the deprivation exactly was. Plaintiff does not specify what hearing or hearings he is referring to, or even what the hearings were regarding. Therefore, because Plaintiff’s naked assertions do not rise to the pleading standards required to withstand a Motion to Dismiss under Rule 12(b)(6), we recommend that the claim against Defendant McDermott be **dismissed**.

#### **D. Americans with Disability Act**

In his Second Amended Complaint, Plaintiff states that he has a cause of action under the

Americans with Disability Act (“ADA”). Second Am. Compl. at p. 7. This claim is not supported with any facts, nor the names of the parties it is purportedly directed. Besides previously stating, with relation to his claims against Defendant McDermott, that he suffers from some type of learning disability, Plaintiff does not specifically allege what disability he suffers from, nor what he was denied. Furthermore, Plaintiff does not allege under which Title of the ADA he is suing under. Thus, for the preceding reasons and because the Plaintiff states no facts, allegations, nor specific discussion of this claim, we find that to the extent that Plaintiff is attempting to assert a claim under the ADA against any individual Defendant, the claim should be **dismissed**.

### III. CONCLUSION

While this Court recognizes the Second Circuit’s preference to provide *pro se* plaintiffs with leave to amend their pleadings prior to dismissal, Loadholt has already been afforded two opportunities to amend his Complaint.

For the reasons stated herein, it is hereby

**RECOMMENDED**, that the Defendants’ Motion to Dismiss (Dkt. No. 28) be **GRANTED** and Plaintiff’s Second Amended Complaint (Dkt. No. 9) be **DISMISSED**; and it is further

**ORDERED**, that the Clerk of the Court serve a copy of this Report-Recommendation and Order upon the parties to this action.


Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court.

**FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN (14) DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993) (citing *Small v. Sec’y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989)); *see also* 28 U.S.C. §



636(b)(1); FED. R. CIV. P. 72, 6(a), & 6(e).

Date: March 3, 2011  
Albany, New York



RANDOLPH F. TREECE  
United States Magistrate Judge

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